Michigan
Manufacturers
Association

June 11, 1998

Ms. Victoria Hayden
Regulation Development Section (AR-18J)
Air Programs Branch, Air and Radiation Division
United States Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

Dear Ms. Hayden:

Subject: **Michigan Manufacturers Association Support for the Direct Final Rule Making Michigan's SIP Consistent with the Requirements of the Clean Air Act (63 Fed. Reg. 27492, May 19, 1998)**

The Michigan Manufacturers Association (MMA) supports the U.S. Environmental Protection Agency's (USEPA) direct final rule making Michigan's State Implementation Plan (SIP) consistent with the requirements of the Clean Air Act (CAA). (63 Fed. Reg. 27492, May 19,1998)

As noted in the direct final rulemaking, Michigan's air quality Administrative Rule 901 (R336.1901) is a general rule which prohibits the emission of an air contaminant which is injurious to human health or safety, animal life, plant life of significant economic value, property; or which causes unreasonable interference with the comfortable enjoyment of life and property. Rule 901 has primarily been used by the Michigan Department of Environmental Quality (formerly the Department of Natural Resources) as an odor and nuisance rule. It has not been used to attain nor maintain any National Ambient Air Quality Standards ("NAAQS"), nor to satisfy any other provisions of the Clean Air Act.

For the record, a detailed review and analysis of the history, the uses, and various state and federal agency and court interpretations regarding Rule 901 is attached. This information provides additional support for the USEPA's direct final rulemaking regarding Michigan's Rule 901.

In closing, the Michigan Manufacturers Association fully supports the USEPA's action to correct the SIP in accordance with section 110(k)(6) of the CAA and to clarify that Rule 901 is not a part of the Michigan SIP.

Sincerely,

Matthew G. Hare
Director of Regulatory Affairs

Enclosure

Inside E.P.A. Weekly report

NOV 24 1997

An Inside Washington Publication

An exclusive report on the U.S. Environmental Protection Agency

Vol. 18, No. 47 - November 21, 1997

Concerned over emissions increases from computer changes

EPA REVIEWING WHETHER KEY AIR PERMITTING PROGRAMS NEED STRENGTHENING

EPA staff are studying whether the agency's Clean Air Act new source permitting programs need to be strengthened so that companies must undergo additional review before installing computer equipment that has the potential of increasing a facility's emissions, EPA sources say.

Historically, computer equipment changes have been largely exempt from permit reviews since they do not entail a physical change to a facility. But EPA sources warn that the agency is growing concerned that this regulatory loophole provides industry with an opportunity to routinely boost their emissions.

continued on page 6

EPA DRAFTING NEW TSCA TESTING RULE FOR HIGH PRODUCTION CHEMICALS

EPA is drafting a new regulation that would require U.S. manufacturers of high-production chemicals to perform a battery of hazard screening tests, according to EPA sources who say the rule could be the broadest testing regulation ever issued by the agency under the Toxic Substances Control Act (TSCA).

Agency officials say they are drafting the regulation after concluding that voluntary industry efforts to perform hazard screening tests, known as the Screening Information Data Set (SIDS), have made little progress toward an international goal to provide complete SIDS information for 25 percent of the world's high production-volume (HPV) chemicals.

continued on page 10

WHITE HOUSE'S INDUSTRY ALLIES QUESTIONING WISDOM OF CLIMATE DEAL IN KYOTO

A prominent industry coalition that has supported the White House in its pursuit of a new climate change treaty may soon urge President Clinton to abandon efforts to seal a new accord this year and instead seek a "mandate" for countries to pursue further negotiations.

Industry officials say that too many issues related to the treaty remain unresolved, and in particular, that the fate of U.S. proposals for the treaty is dangerously uncertain. In a draft letter that may be sent to Clinton this week, the International Climate Change Partnership calls on Clinton to "work towards a mandate from the Kyoto meeting that keeps alive all of the issues being advocated by the United States" and defer a final agreement until 1998 or 1999.

continued on page 14

Targeting most egregious violators

EPA TO BOLSTER ENFORCEMENT OF SEWER OVERFLOW PROGRAMS IN 1998

EPA plans to bolster its enforcement of sewer overflow control programs next year, according to agency sources who say EPA's regional offices will specifically target egregious violators, such as municipalities who experience overflows during dry weather.

Some regional sources suggest that this move may signal that headquarters is considering backing away from its controversial proposal to give municipalities blanket protection from agency enforcement actions under certain circumstances.

continued on next page

INSIDE

Environmentalists are hailing the decision as a significant victory, claiming that the issue has been a source of serious disagreement in the past. One source says the timing of the ruling is also critically important since many expect Congress to consider legislation on state certification issues in the near future. This source notes that the House held a hearing this fall on this particular issue.

EPA STAFF DIVIDED OVER WHETHER TO RELEASE NEW SEDIMENT DISPOSAL GUIDANCE

EPA officials are sharply divided over whether to release a new guidance for determining which dredged materials are suitable for disposal in fresh water, leading some to predict that the guidance could languish at the agency for several more years.

The dispute centers around whether the release of the guidance should be further delayed until new ocean dumping regulations are developed, or whether the guidance, which is largely completed, should be released in the interim.

In April, environmentalists asked EPA to release its "Inland Testing Manual," which is intended to help establish consistent standards for determining which types of dredged material can be safely disposed in fresh water. Environmentalists say that the technical aspects of the manual have been complete for several years and have already been endorsed by the Army Corps of Engineers. Environmentalists and some EPA staff are sharply criticizing the agency's failure to move forward on this front, claiming that inconsistent disposal practices are being used across the nation while the agency sits on this project.

EPA sources say the agency is divided over whether to release this guidance in the near term or delay its release until the agency has completed negotiations over its controversial ocean dumping regulations. Early in 1996, EPA proposed new ocean dumping regulations which would have regulated the disposal of sediments into oceans. But environmentalists blasted the proposal, claiming it would weaken several critical ocean regulations. As a result, EPA agreed to withdraw the rule and convene a group under the Federal Advisory Committee Act to negotiate a new regulatory approach. These negotiations are expected to wrap up at the end of next summer.

An EPA source argues that the two efforts — the inland testing manual and ocean dumping regulations — are closely linked and should be considered in tandem. This source says that final approval of the inland testing manual should be folded into FACA discussions since similar issues surround both projects.

But other agency officials argue that EPA could release the testing manual as interim guidance and could later revise it based on the ocean dumping regulations. One source argues that it is "irresponsible" of the agency to hold onto the testing manual, claiming that "it could take several years for the dumping regulations to be finished."

EPA sources say they appear to have reached a stalemate on the issue, which is leading some to say that the guidance could languish for another year or so in the agency. One source explains that there is a fundamental difference in opinion in the agency over how to proceed. "Disagreements of this sort usually result in more delays," one source predicts.

At the same time, environmentalists and Corps officials are stepping up pressure to get EPA to release the testing manual immediately. Environmentalists say that without these guidelines, potentially dangerous sediments are being dumped without any guidance from EPA. "We are particularly concerned about dioxin and PCBs," an environmentalist says, adding that state fish advisories show significant levels of these contaminants have built up to dangerous levels in fish tissue.

REGION V TELLS MICHIGAN TO MERGE 'NUISANCE' LAW INTO AIR PERMITTING PROGRAM

EPA Region V has sparked a controversy in Michigan by concluding that industries in the state must comply with an antiquated Michigan nuisance law as part of their obligation to satisfy the Clean Air Act's permitting requirements.

If this determination is not reversed, companies in the state would likely be required to conduct additional monitoring and annually certify that they are complying with a law that has often been used to control bothersome odors.

The region's determination could have significant implications nationally since a number of states may have similar laws on the books, observers say. But EPA staff say that national air program managers are skeptical of the determination and would likely counsel other regional offices to reject Region V's approach.

The controversy stems from a 1970s Michigan law that generally prohibits companies from emitting pollution that interferes with the population's ability to enjoy "life and property." The law, which is fairly ambiguous, has been used in part by state officials to address nuisances and odors. However, state sources point out that the law has also been used to redress situations where the environment has been threatened or harmed.

In recent weeks, EPA Region V has taken the position that Michigan needs to account for this law when it issues Clean Air Act Title V operating permits. The region's determination is premised on an interpretation that the state incorporated the law into its Clean Air Act state implementation plan (SIP) during the 1970s, state sources say. This conclusion presents a problem since EPA's Title V regulations require that states issue permits that make reference to all applicable requirements that are included in a SIP, state sources say.

continued on next page

Industry sources say the determination could have grave consequences for facilities located in the state. If the determination stands, Title V would dictate that companies develop periodic monitoring programs to ensure that they are complying with the nuisance law, industry sources say. One industry representative stresses that this would be "next to impossible," while another adds that it would be "ridiculous" if companies had to periodically check to see if facility odors were below an acceptable level and annually certify that there facilities were complying with the nuisance law.

State officials are also expressing concern over the determination, with one noting that it is inconsistent with historical agency policy since EPA has generally taken the position that odors and other nuisances are local problems that should be handled at the local level. Another state regulator adds that the determination could slow the issuance of permits that are already overdue, since the state would have to grapple with new and time-consuming issues in the permitting process.

Industry sources say that while this issue is currently contained to Michigan, it could have serious national implications since other states are thought to have similar laws in place. An industry source notes that in the early 1970s, states were inclined to throw "everything under the sun into their SIPs" and therefore it is possible that other states could eventually find themselves in the same spot as Michigan.

While regional sources could not be reached for comment, EPA headquarters staff suggest that the national air program will generally urge regions to reject the interpretation that has been advanced by Region V. An air program source explains that these nuisance laws were not enacted to bring areas into attainment with national ambient air quality standards and therefore they should not be included in Title V programs. A second EPA source adds that headquarters will probably raise some concerns with Region V, but notes that it is too early to tell whether the region will be overruled and the determination reversed.

If Region V is successful in maintaining its determination, one industry source says that companies would pressure the state to delete the nuisance law from the SIP. This source doubts that EPA would or could block such a move since it would have very little impact on either the state or the federal air quality program.

HOUSE REPUBLICANS RAISE CONCERNS ABOUT PROPOSED EPA MINING WASTE RULES

House Republicans are taking EPA officials to task over the agency's proposals to tighten controls on mineral processing operations under the Resource Conservation & Recovery Act, charging that EPA is taking a "back-door approach" to bring mining wastes under federal hazardous waste management rules.

But EPA officials say the lawmakers' concerns are premature, and that the agency's options for proceeding with its proposed mineral processing waste regulations are still under discussion.

EPA in May issued a supplemental proposal for its "Phase IV" land disposal restrictions (LDR) rules under RCRA, laying out potential treatment standards for a range of metal wastes and wastestreams from mineral processing operations. At the same time, EPA offered new proposals specifically related to the recycling of secondary materials and the mixing of regulated materials with non-regulated materials in facility feedstocks.

First, the agency solicited comment on whether secondary materials that are RCRA-exempt for recycling purposes should continue to be stored in land-based units, suggesting that the materials should instead be held in more protective tanks and containers. Second, EPA solicited comment on whether wastes generated from a mixture of regulated feedstocks and "Bevill" wastes should retain their RCRA-exempt status. The so-called "Bevill amendment" to RCRA excludes many oil, utility and mining wastes from RCRA unless EPA determines in a report to Congress that they present enough of a risk to human health and the environment to warrant federal regulation. EPA proposed limiting the availability of the Bevill exemption to wastes generated exclusively from the use of Bevill raw materials.

Finally, EPA presented new information on the risks from Bevill-exempt mining and mineral processing wastes and raised the question of whether certain wastes warrant further study or additional regulatory controls. In particular, the agency said it has concerns about environmental damage from acid mine drainage, the use of cyanide and other chemicals, and the stability of tailings piles, among other things. EPA said if new regulatory action is warranted, it will be pursued in another rulemaking separate from the Phase IV regulations.

The proposals have drawn forceful criticisms from the mining and mineral processing industries, and now as the agency is moving to finalize the rule, Republican lawmakers are raising concerns as well. EPA and congressional staff say that House Energy & Power Subcommittee Chairman Dan Schaefer (R-CO) and Finance & Hazardous Materials Subcommittee Chairman Michael Oxley (R-OH) are particularly concerned about the proposals, and the lawmakers recently met with EPA Acting Assistant Administrator for Solid Waste & Emergency Response Michael Shapiro to air their views.

In a recent letter to EPA Administrator Carol Browner, Schaefer says that the agency's proposals would undermine the industry's recycling efforts and result in more waste bound for disposal. In addition, Schaefer notes that in January 1996, EPA said that restrictions on the use of alternative feedstocks would amount to a "back door route" to revising previous regulatory determinations. Schaefer says the May 1997 proposal "is exactly the 'back door' approach that the agency had rejected in 1996." He also says that the request for comments on revisiting the status of Bevill

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

No. 85-CV-10309-BC

Hon. James P. Churchill

FRANK J. KELLEY, Attorney General of the State of Michigan; FRANK J. KELLEY, Ex Rel Michigan Air Pollution Control Commission, Michigan Natural Resources Commission, and DR. RONALD SKOOG, Ph.D., Director of the Michigan Department of Natural Resources,

Intervening Plaintiffs,

v

MONITOR SUGAR COMPANY,

Defendants.

_____/

MEMORANDUM OF LAW

FRANK J. KELLEY
Attorney General

Stewart H. Freeman
Assistant Attorney General in Charge

Stanley F. Pruss
Assistant Attorney General

Amara L. Whitcher
Law Clerk

BUSINESS ADDRESS:
Environmental Protection Division
720 Law Building
Lansing, MI 48913
(517) 373-7780

Dated: July 16, 1986

INDEX OF AUTHORITY

Federal Cases:

Statutes:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v

No. 85-CV-10309-BC

FRANK J. KELLEY, Attorney General of the State of Michigan; FRANK J. KELLEY, Ex Rel Michigan Air Pollution Control Commission, Michigan Natural Resources Commission, and DR. RONALD SKOOG, Ph.D., Director of the Michigan Department of Natural Resources,

Hon. James P. Churchill

Intervening Plaintiffs,

v

MONITOR SUGAR COMPANY,

Defendants.
_____/

MEMORANDUM OF LAW

Introduction

At the close of the hearing of July 2, 1986, on Intervening Plaintiffs' ("State") Motion for Preliminary Injunction, the Court requested of the State a memorandum directed to the issue of whether the Court has subject matter jurisdiction over the matters set forth in the State's First Amended Complaint. This memorandum responds to the Court's request of the State to "steer through" the issue of the Court's jurisdiction.

I. The State May Amend Its Complaint as of Right.

Section 304(b)(1)(B) of the Clean Air Act, 42 U.S.C. 7604(b)(1)(B), provides that "any person may intervene as a matter of right" in an enforcement action brought under the Act, such as the instant action by the United States.[1] Section 304(b)(1)(B) has been judically interpreted as conferring an unconditional right to intervene. U.S. v Republic Steel, 15 Environment Reporter Cases 1462, (N.D. Ill. 1980) (the language of the Clean Air Act grants an unconditional right to intervene if done in a timely fashion). United States v Reserve Mining Co., 56 FRD 408 (D Minn, 1972) (in lawsuit where State's interest is made an intrical part of federal policy, intervention is as of right).

Once granted a motion to intervene, the party may amend pursuant to FR Civ P 15(a):

> "A party may amend this complaint once as a matter of course any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, he may so amend it at any time within 20 days after it is served".

---

[1]Section 04(b)(1)(B) provides in pertinent part as follows:
> If the administrator...has commenced and is diligently prosecuting a civil action in a court of the United States...to require compliance with the standard, limitation, or order...any person may intervene as a matter of right." 42 U.S.C. 7604(b)(1)(B) (emphasis added).

Thus, a plaintiff has a right to amend without leave of court where, as in the cause sub judice, no answer has been filed. DeLa Cruz-Saddul v Wayne State University, 482 F Supp 1388 (DC Mich 1980). It follows then, that a plaintiff, whether or not he became such by intervening in the action, also has this right as a matter of course to intervene in the action.

II. The State May Amend Its Complaint to Incorporate a New Cause of Action.

The original State complaint filed in this matter sought to redress violations of the Michigan Air Pollution Control Commission Rules ("MAPCC") 336.1301 which limits visible emmisions (opacity) and 336.1331 limiting the amount of or "mass [of] particulates" which may lawfully be emitted by Monitor's plant. Both MAPCC Rule 336.1301 and 336.1331 were approved by the U.S. EPA on May 6, 1980[2] and are part of the federally enforceable State Implementation Plan ("SIP").

Federal jurisdiction for the State's original complaint was based upon 42 USC 7604 (a)(1)(A) which governs citizen suits "against any person...who is alleged to be in violation of (A) an emission standard or limitation under this Act..." In the original State complaint, the violations concerned emissions from Monitor's smokestack which are alleged to be in excess of the standards or limitations set forth in MAPCC Rules 336.1301

---

[2]45 Federal Register 29790 (1980).

and 336.1331. Accordingly, federal jurisdiction is properly involved under the State's original Complaint.

The State's First Amended Complaint alleges, in addition to the above, certain violations of MAPCC Rule 336.1901 and its antecedent MAPCC Rule 336.46[3] which establish standards or limitations for emissions that constitute an unlawful nuisance. The factual context which invokes application of these rules concern the existence of ponds and lagoons on Monitor's property. There is not, therefore, a direct factual nexus between the foundational facts in the State's original complaint and the additional foundational facts in the State's amended complaint as the situations do not, strictly speaking, arise out of the same conduct, transaction or occurrence.[4] While both the original facts and additional facts concern "emission standards or limitations" within the meaning of 42 USC 7604(a)(1)(A) (infra, p 6), the additional facts in the State's amended complaint can be construed as constituting a new cause of action.

Even though the State's amended complaint addresses additional facts in must nevertheless be allowed. While a small

---

[3]The issue of whether MAPCC Rules 336.1901 and 336.36 which govern nuisances are federally enforceable under 42 USC 7604(a)(1)(A) is set forth in part III infra, p 6.

[4]Whether an amended complaint concerns conduct, transactions or occurrences addressed in the original complaint is relevant only to the question of determining whether the amendment relates back to the filing of the original complaint. F R Civ P Rule 15(d), Wright and Miller, Federal Practice and Procedure: Civ1, § 1474.

number of courts have indicated that an amendment substantially changing the original claim or defense so as to present a new claim or defense should not be allowed, this minority line of cases has been severely criticized. Wright and Miller, Federal Practice and Procedure: Civil §1474. Amendment of a complaint is permitted at any stage of the proceedings and should be liberally granted by the court to avoid delay in the determination of the case on the merits and to prevent the defeat of justice. McHenry v Ford, 269 F2d 18 (CA6, 1959). See also, Howard v Kerr Glass Co., 699 F2d 330 (CA 6, 1983); Tefft v Seward, 689 F2d 637 (CA 6, 1982). Amendments are to be liberally granted even when amendment seeks to add an entirely new cause of action. Sperberg v Firestone Tire & Rubber Co., 61 FRD 78 (D C Ohio, 1973) (Plaintiff would be allowed to amend complaint to allege infringement of related patent, which patent was not granted until after original action was commenced); Riley v Smith, 570 F. Supp 522, (ED Mich, 1983) (Prison inmate allowed to amend complaint to incorporate claim for harrassment following filing of lawsuit).

In the cause, sub judice, amendment will promote the orderly administration of the law while avoiding relitigation of air emission related issues in another lawsuit. There has been no showing of prejudice or undue delay resulting from the amendment. Importantly moreover, no other party has objected to or opposed the State's amendment.

III. MAPCC Rules 336.46 and 336.1901 Are "emission standards or limitations" Within the Meaning of 42 USC 7406(a)(1)(A).

As part of Michigan's original state implementation plan (SIP), the Administrator of the EPA approved certain regulations proposed by the Michigan Air Pollution Control Commission, 40 Fed. Reg. 10842 (1972). Included in these regulations, which then became part of the federally enforceable Michigan SIP, was MAPCC Rule 336.46. This rule mandated, in pertinent part, that:

> "...no person shall cause or permit the emission of an air contaminant or water vapor...which causes or will cause detriment to the safety, health, welfare or comfort of any person, or which causes or will cause damage to property or business".

This rule has been succeeded by MAPCC Rule 336.1901 which states as follows:

> "...a person shall not cause or permit the emission of an air contaminant or water vapor in quantities that cause, alone or in reaction with other air contaminants, either of the following:
>
> (a) Injurious effects to human health and safety, animal life, plant life of significant economic value, or property.
>
> (b) Unreasonable interference with the comfortable enjoyment of life and property".
>
> Michigan Air Pollution Control Act Rule 336.1901.

MAPCC Rule 336.1901, while essentially repeating the prohibitions of Rule 336.46, is not part of Michigan's federally

enforceable SIP. It is clear, however, that the plaintiff's complaint states a cause of action with respect to both MAPCC Rules 336.46 and 336.1901. Many of the exhibits show that residents near Monitor have become ill from inhaling the plant's odors and that the odors have had a substantial impact on the public's comfort and well-being.

MAPCC Rule 336.46, although succeeded by Rule 336.1901 for state purposes, remains as the federally enforceable nuisance standard. Monitor, as a source of air emissions, is subject to both state and federal emission standards until such time as EPA formally approves the succeeding rule. Metropolitan Washington Coal v District of Columbia, 511 F2d 809 (CA DC, 1975); Natural Resources Defense Council, Inc. v EPA, 507 F.2d 905 (9th Cir. 1974); Natural Resources Defense Council, Inc. v. EPA, 494 F.2d 519 (2d Cir. 1974); Natural Resources Defense Council, Inc. v. EPA, 483 F.2d 690, 693-94 (8th Cir. 1974).

The issue becomes, therefore, whether MAPCC Rules 336.46 and/or 336.1901 are "emission standards or limitations" within the meaning of 42 USC 7406 (a)(1)(A). The Clean Air Act, 42 USC 7402(k), defines an "emission standard" or "emission limitation" as

> "a requirement established by the State or the Administrator which limits the quantity, rate or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction".

In Concerned Citizens of Bridgesburg, v Philadelphia Water Department, slip op No 85-14 (ED Penn, 1985) (opinion attached), the court faced the virtually identical issue. Bridgesburg concerned a 42 USC §7604 citizens' suit brought by community members disturbed by the Philadelphia Northeast Water Pollution Control Plant's release of nauseating odors. The plaintiffs sought and were awarded declaratory, injunctive and other relief.

The Court in Bridesburg delineated a two-pronged test which provides guidance in settling the issue at hand. The first question is whether plaintiffs have alleged that the defendants have violated "a requirement established by the State or the Administrator". The second question asks whether the requirement "limits the quantity, rate or concentration of emissions of air pollutants on a continuous basis". If both questions are answered affirmatively, then the plaintiffs have established federal jurisdiction; if one question is answered negatively however, the complaint will be dismissed for lack of subject matter jurisdiction. Id. at 14.

Application of the first question to the cause sub judice clearly yields an affirmative answer. The State has alleged that Monitor, by acts and/or omissions, has violated both federally enforceable Rule 336.46 and its State counterpart 336.1901. Both rules are "requirements established by the State or the Administer."

The second prong of the Bridgesburg tests the question of whether the requirement "limits the quantity, rate or concentration of emissions of air pollutants on a continuous basis". 42 USC §7602(k). The defendants in Bridgesburg argued that odors are not considered a designated pollutant and are not related to the national ambient air quality standards. Bridgesburg, slip op at 14-15. Thus, defendants argued, the odor regulations should not be considered emission standards or limitations and are not federally enforceable.

In its adjudication of this issue, two arguments presented in Friends of the Earth v Potomac Electric Power Company, 419 F Supp 528 (DDC 1976), were cited in Bridgesburg as being instructive of in the issue of whether odor regulations are emission standards for purposes of federal jurisdiction. Plaintiffs in Friends of the Earth, argued that Potomac Electric Power Company (PEPCO) allegedly violated District of Columbia's visible emission regulations. PEPCO tried to avoid the restrictions of the visible emission regulation because a revision of the SIP was expected to be approved by the EPA. The proposed revision was less stringent than the old standard and there was evidence that suggested that EPA would disapprove the revision as being impracticable because even it was too stringent. Friends of the Earth, 419 at 533. PEPCO argued, therefore, that because the new regulation was less stringent than the old and because the District of Columbia and the EPA felt the old regulation as well as the new regulation were too stringent, it would be

ludicrous to require compliance with the old regulation. The court determined that:

> "However attractive this argument might at first appear, the Court does not start with a clean slate in interpreting the law. It is now settled that a state implementation plan (SIP) may contain control strategies involving emission limitations more stringent than those necessary to meet the minimum requirements of the primary and secondary ambient air quality standards. Union Electric Co. v Environmental Protection Agency, 427 U.S. 246, 96 S. Ct. 2518, 40 L.Ed. 2d 474 (1976). Revisions in an SIP must be approved by EPA to become effective, see Train v. N.R.D.C., 421 U.S. 60, 95 S. Ct. 1470, 43 L.Ed.2d 731 (1975), and before any such change is approved the effective, federally-enforceable requirement is the prior one, which has been approved by EPA. Metropolitan Washington Coalition For Clean Air v. District of Columbia, 167 U.S. App. D.C. 234, 511 F.2d 809 (1975). The current federally-enforceable requirement is therefore the original §8-2:713, wholly prohibiting visible emissions."
>
> Friends of the Earth, 419 F. Supp. at 533.

This is important, as it was in Bridgesburg,, because Michigan's new MAPCA Rule 336.1901 regarding odor emissions is more stringent than that needed to meet and attain the minimal requirements of the primary and secondary ambient air quality standards. Pennsylvania's SIP in Bridgesburg contained limits stricter than the EPA minimum, as does Michigan's SIP, which is perfectly permissible. While MAPCC Rule 336.46 is federally enforceable, both it and Rule 336.1901 are permissible under federal law. Accordingly, the State may use the citizen suit

provision of the Clean Air Act to enforce MAPCC 336.46, and enforce Rule 336.1901 through this Court's pendant jurisdiction.

The defendant in Friends of the Earth also argued that the visible emission regulation was not federally enforceable because it did not implement an ambient air quality standard. Id. at 533. The court rejected this argument stating that PEPCO would have to show that the "visible emissions are wholly unrelated to the emission of any pollutants for which there are ambient air quality standards". Because visible emissions are a result of particular emissions during abnormal operations, the Court reasoned, the emissions do relate to the achievement of ambient air quality standards, Id. at 534.

Similarly, Monitor Sugar would have to show that odor emissions are wholly unrelated to the emission of pollutants for which there are ambient air quality standards. Therefore, unless defendants can show that there is not a single 'air pollutant' (as defined in the Clean Air Act 42 USC 7602(g) affected by control of 'malodorous air contaminants'), then this court cannot hold that the odor emission regulations in the SIP do not "limit the quantity, rate, or concentration of emissions of air pollutants on a continual basis". Bridgesburg, slip op at 18. In the present case, the Department of Natural Resources has repeatedly given notice to Monitor Sugar to control the odors by proper treatment and disposition of their waste water. This control of the odors would limit the quantity, rate and/or concentration of emissions of the pollutants on a continuous basis.

Both prongs of the Bridgesburg test have been answered affirmatively by the plaintiffs in the Monitor Sugar case. Because the plaintiffs have properly alleged a violation of an emission limit, this federal court has jurisdiction to hear Michigan's nuisance action brought pursuant to the citizens' suit provision under the Clean Air Act.

FRANK J. KELLEY
Attorney General

Stewart H. Freeman
Assistant Attorney General in Charge

Stanley F. Pruss
Assistant Attorney General

Amara L. Whitcher
Law Clerk

BUSINESS ADDRESS:
Environmental Protection Division
720 Law Building
Lansing, MI 48913
(517) 373-7780

Dated: July 16, 1986